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PRIVATE LAW DAMAGES AS A METHOD OF STATE ACCOUNTABILITY: THE TORT EXCEPTION TO STATE IMMUNITY

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One of the themes of this collection of papers concerns new dimensions of State accountability. The individual is likely to be the main beneficiary of improved accountability on the part of States and the question consequently arises whether the individual should not himself be actively involved in the process of achieving State accountability. One aspect of this question relates to the use of private law remedies in national legal systems to enforce international law obligations of the State. In this paper I examine, by reference to the tort exception to State immunity, which is enacted in the United States Foreign Sovereign Immunities Act 1976 (FSIA) and the United Kingdom State Immunity Act 1978 (SIA), the feasibility of such a private law remedy for damages to enforce international law.

I. The Character of International Law

Traditionally international law has concerned itself with the rights and interests of States. The protection of individuals was achieved only indirectly through the protection of States' rights. International law consequently is primarily concerned with relationships between States; it defines the exclusive territory and jurisdiction of the State, regulates areas such as high seas and outer space outside State jurisdiction; allocates between States competing jurisdictions over internationally prohibited or harmful conduct such as piracy, hijacking of ships and aircraft, terrorism, marine pollution, drug traffic and extends its protection within a State's territory to special categories of persons such as diplomats, consuls, visiting forces, aliens. Recently, however, beginning with the standard-setting in humanitarian and

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human rights Conventions, there has been an increasing trend for the adoption of international Conventions establishing substantive norms of direct application by States to all persons within their national legal orders. The Genocide Convention, International Convention on the Elimination of all forms of Racial Discrimination, the Torture Conventions, and the UN Convention on the Rights of the Child[1] are some of these International standard-setting Conventions.

II. Implementation

The method of implementation in these international Conventions is by treaty obligation requiring action on the part of the Contracting States. These "international obligations have different structures and impose their requirements on States in ways which are not always the same."[2] In some Conventions only the object to be achieved is stated — "to secure to everyone within the [State's] jurisdiction the rights and freedoms defined" for instance as in article 1 of the European Convention on Human Rights — and the Contracting State is free to decide on the method of implementation. In others, the obligation may be more specific and identify which branch of government of the State Party is to implement the treaty's provisions: thus the Hague Convention on Obtaining Evidence and the Brussels Convention on Jurisdiction and Judgments identify the civil courts as the implementing agency, and other Conventions such as the Hague Uniform Sales Convention 1964 require the State's legislature to enact the treaty provisions "into its own legislation in accordance with constitutional procedures."[3]

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1. Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 U.N.T.S. 277; International Convention on the Elimination of All Forms of Racial Discrimination 1966, 60 U.N.T.S. 195; Inter-American Convention to Prevent and Punish Torture 1985, 25 ILM 519; European Convention for the Prevention of Torture and Inhuman Degrading Treatment or Punishment 1987 Misc. 5 (1988), Cm.339; UN Convention on the Rights of the Child, New York, 26.1.90.

2. R. Ago's Commentary to ILC Draft Articles on State Responsibility, 1977 11 LCYB pt. 2, p. 12 where he expounds the distinction between obligations of means and of result.

3. Convention relating to a Uniform Law of the International Sale of Goods 1964, article 1(1) 834 U.N.T.S. 107.

Sometimes where conduct is prohibited the Convention goes further and expressly identifies the branch of the law and method of enforcement: where international standards require enforcement in municipal law, the criminal law is the usual method of implementation. Thus for example, the 1949 Geneva Conventions require "effective penal sanctions for persons committing any of the grave breaches" of humanitarian law there set out.[4] The Genocide Convention, 1948, the Tokyo, Hague, and Montreal Conventions relating to hijacking of aircraft, the New York Convention on Crimes against internationally Protected Persons, 1973, and the European Convention on Terrorism all use this machinery of municipal criminal law to achieve the prohibition of internationally defined unlawful acts.[5] Whilst it is a considerable advance in treaty implementation to achieve the enactment of the internationally prohibited conduct into the national penal code, the decision to prosecute and the conduct of the trial remains in the hands of the government of the contracting State. It is, indeed, a paradox of the working of international law and possibly an explanation of municipal courts' cautious attitude toward international law, that the implementation of international obligations into the national order frequently results in increased restrictions on the freedom of conduct of individuals rather than enhancement of their personal rights.

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4. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 75 U.N.T.S. 31 article 49; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949 75 U.N.T.S. 85 article 50; Geneva Convention Relative to the Treatment of Prisoners of War 1949 75 UNTS 135; article 129 Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 75 U.N.T.S. 287; article 146.

5. Tokyo Convention on Offences and Certain Other Acts committed on board Aircraft 1963 704 U.N.T.S. 219; Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 860 U.N.T.S. 105; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 U.K.T.S. 10 (1974) Cmnd.5524; New York Convention on the Protection and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents 1973 U.K.T.S.. 3 (1980) Cmnd.7765; European Convention on the Suppression of Terrorism 1977 U.K.T.S. 93 (1978) Cmnd.7390.

III. Growing Involvement of Individuals in International Law

Yet there is growing involvement of individuals in enforcement of international law. In a limited class of internationally extrahazardous operations, treaty requires States to provide a direct remedy in municipal law to individuals who suffer damage as a result of such operations. A start has been made with certain extrahazardous operations which may cause damage across frontiers. Thus the 1952 Rome Convention relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface provides that every person who suffers and proves such damage shall be entitled to compensation which is to be recovered in the court of the Contracting State where the damage occurred.[6] More significantly the right of individual application under the Optional Protocol of the International Covenant for Civil and Political Rights and Article 25 of the European Convention on Human Rights were a first step towards giving an individual a right to enforce the international obligations of a State relating to personal liberties of the individual provided the State consented to such an option: the remedy, however, gave recourse to international procedures set up by the Conventions, not to the municipal courts of the Contracting Parties. Yet indirectly, by revision of municipal laws following decisions of the international agencies and by citation of their decisions in municipal courts, some implementation of the treaty obligations has been achieved in the national legal order of the Contracting State. Is this accountability of governments which has been achieved by individuals in the field of human rights expandable by using a private law remedy? If international conventions now contain rules intended to apply to all persons, would not the bringing of a private law remedy in the municipal system by the individual to enforce these rights be an effective method of implementing those rights?

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6. Article 1, 310 U.N.T.S. 181; *see also* Brussels Convention on the Liability of Operators of Nuclear Ships, 1962, 52 *American Journal of International Law* 268; Vienna Convention on Civil Liability for Damage Caused by Space Objects 1972 U.K.T.S. 16 (1974)Cmnd.5551.

IV. Difficulties of Private Law Remedy

Such a proposal is radical. It would permit an individual through his municipal law to sue a State for failure to carry out a treaty obligation. As such, it raises fundamental issues as to the juridical structure of the international order, as well as political and practical problems. In confronting these problems, however, it should not be forgotten that claims to human rights were regarded as equally radical when first put forward.

The juridical difficulty arises from the conversion of an international commitment between States into a private law remedy enforceable in the court of one of those States against the other State without the latter's prior consent. Three differences of structure are involved in such a conversion process, differences relating to the enforcement agency, the obligation to be implemented and the right to be protected. Taking them in turn, the use of a private law remedy will make the local municipal court the enforcement agency. Whilst the adjudication by municipal courts of disputes relating to the conduct of States may serve to "depoliticise" the issues, making them subject to ordinary law,the process assumes "judicial or manageable standards"[7] by which to judge the State's conduct. Much inter-State commitment by treaty is undertaken in the expectation that only international methods of dispute settlement or adjudication will apply in the event of breach of obligations. Traditionally a claim relating to breach of international obligation is resolved by diplomacy, supplemented by regional or UN procedures. Any determination in accordance with international law by arbitration or the International Court of Justice requires the alleged offender State's consent. Where damage is caused to citizens in the territory of another State, the rule of exhaustion of local remedies operates so as to leave to the author State of the damage, the decision whether to treat the claim as one of private law or of State responsibility.[8]

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7. Buttes *Gas v. Hammer* (Nos.2 & 3) (1981) 3 AER 616 at p.633 per Lord Wilberforce quoting the U.S. 5th Circuit Court of Appeals.

8. For full discussion *see* Commentary on draft article 22 Exhaustion of Local Remedies, 1977 11 ILCYB pt.2 p.30.

As regards the obligation undertaken, the question arises whether an international obligation undertaken in respect of other contracting States is capable of being discharged by the grant of a private law remedy to an individual. Unlike the conversion into a criminal offence subject to prosecution in a municipal court, such a private law remedy would be at the discretion of the private litigant. Can an international obligation depend on an individual's choice of whether or not to exercise it, or be subject to waiver or compromise at that individual's decision regardless of the State interest in the matter? One of the obstacles which prevented the acceptance by the UN 6th Legal Committee of Garcia Amador's 1961 Draft on the Obligations of the Host State in respect of Treatment of Aliens was on account of Article 21, which permitted the alien to sue the State directly for wrongful treatment.[9] The acceptance of President Reagan's offer to pay compensation to the relatives of victims of the shooting down by U.S. Vincennes of the Iranian civil aircraft in July 1988 raised this issue;[10] here the United States sought to discharge its international obligation to respect the freedom of international civil air flight owed to the Republic of Iran by direct dealing with the injured individuals involved. The third structural difference turns on the nature of the right to be protected. Can a private individual benefit and enforce a right created by one State in favour of another? A recent attempt to do so is to be found in the line of cases brought in the U.S. Federal Courts under the Alien Tort Claims Act 1789. In *Argentine Republic v. Amerada Hess* the 2nd Circuit U.S. Court of Appeals held, "The attacking of a neutral ship in international waters without proper cause for suspicion or investigation" to be actionable in the U.S. Federal court at the suit of a Liberian shipping company.[11] In reversing this ruling, the U.S. Supreme Court held the Foreign Sovereign Immunities Act 1976 to be the exclusive source of U.S. jurisdiction over foreign States for wrongdoing: it referred to the Geneva Convention on the High Seas 1958 and commented that it did "not

9. *UN Year Book 1962*, pp.484-5 and documentary references there cited.

10. *Dept. of State Bulletin* No.2138 (Sept 1988) 39, *see* (1989) 83 *American Journal of International Law* 319.

11. 830 F.2d 421 (2nd Cir).

create private rights of action for foreign corporations to recover compensation from foreign States in United States courts."[12]

To give an individual a remedy in a municipal court to sue a State for breach of international obligation would also have political consequences, in that it would seriously diminish States control over their own and other governments' decisions. A rule of legality applied by municipal lawyers would be substituted for political decision-making; the interest of the individual injured party would prevail over those of the State and the common public concern. Such a remedy might also produce practical problems of administration. The familiar "floodgates" argument may be advanced that courts would be overwhelmed with disgruntled individuals' claims and that public administration of the State would neglect in disposing of individual complaints.

V. The Tort Exception to State Immunity as a Model to Test Such a Private Law Remedy

A blueprint to test these ideas is offered by the tort exception to State Immunity now enacted in U.S. and U.K. legislation. The restrictive doctrine of State Immunity has made considerable headway in the last twenty years, so as to render commercial contracts and commercial trading agencies subject to the jurisdiction of municipal courts.[13]

The effect has been to provide a municipal remedy where previously none existed; in place of diplomatic channels and a claim of State responsibility based on failure to observe minimum international standards, the private contractor may now obtain a declaration of his contractual rights in accordance with municipal law (though he may still find some obstacle to attachment of State assets to satisfy the judgments which he obtains). Is it, then, possible to widen the area of State activity subject to municipal courts so as to

12. 109 Sup. Ct. 683 (1989), 28 ILM 382.

13. Fox, "State Immunity and the State as Trader," in *International Economic Law and Developing States: Some Aspects* 1988 p. 63; Schreuer, *State Immunity: Some Recent Developments* 1988.

include non-contractual tortious or delictual matters? Can international standards of conduct set by treaties or by customary international law, as those relating to minimum international standards of treatment of aliens, for example, be enforced by means of a civil remedy in a municipal court?

VI. The Scope of the Tort Exception to State Immunity

Any private law remedy if it is to function within the municipal legal system requires clearly defined limits to its application. The attempts to adapt the U.S. Alien Tort Claims Act to give such a private law remedy failed because there was no requirement of a jurisdictional link with the U.S. court, or satisfactory process by which the international law which was alleged to give rise to the duty upon the defendant State was transformed into municipal law. The tort exception which is enacted in section 1605(5) of the U.S. FSIA and section 5 of the UK SIA is better defined. Both are subject to two clear limitations. First the court's jurisdiction is given a restricted territorial ambit. The U.S. legislation restricts jurisdiction "to injury or damage occurring in the United States" and this has been interpreted in cases relating to damage to U.S. tourists in foreign hotels, airports and aircraft and in relation to the U.S. hostages in Tehran as requiring both the tortious act and the resultant damage to take place within the United States.[14] The UK statute refers to "injury or loss caused by act or omission in the United Kingdom": and whilst this may give scope to extend the exception to tortious conduct commenced outside but with consequences within the UK, so as to include liability for a letter bomb or terrorist attack on an aircraft,[15] the tort exception remains within a fairly tight

14. *Harris v. Intourist National Hotel and USSR*, 481 F. Supp. 1056 (E.D.N.Y. 1979); *Upton v. Empire of Iran*, 459 Supp. 264 (D.D.C. 1978) *aff'd*, 607 F.2d 494 (D.C. Cir.1979); *Tucker v. Whitaker Travel Ltd.*, 620 F. Supp. 578 (E.D. Pa. 1985); *McKeel v. Islamic Republic of Iran*, 722 F.2d 583 (9th Cir. 1983).

15. See *Distillers Co. (Biochemicals) Ltd. v. Thompson* (1971) AC 458 and discussion in Fox "State Responsibility and Tort Proceedings against a Foreign State in Municipal Courts" 1989 XX *Netherlands Yearbook of International Law* 26.

jurisdictional requirement that the wrongful act must occur in the UK. The second limitation relates to the damage recoverable: claims are confined to death or injury to the person or damage or loss to tangible property. Recoveries for loss of commercial profit and other types of economic loss resulting from tortious conduct of the State are not permitted.[16] However, it should be noted that in both the United States and the United Kingdom Acts, economic loss may be recoverable if the claim can be brought within the "commercial transaction" exception; the definition of such transactions is broad enough in both enactments to permit claims based on tortious conduct in a commercial context to be brought within this exception.[17] A claim that a State fraudulently or negligently misrepresented that the activity was commercial rather than governmental may considerably extend local courts' jurisdiction over acts of officials carrying out government functions such as customs, immigration, police.

A third less developed limitation may confine the claim based on the tort exception to a private law tort. Neither statute requires the wrongful act to be nongovernmental, but the U.S. statute excludes any claim based upon the exercise or failure to perform a discretionary function, the exclusion applying even where the discretion is abused (FSrA s.1605(5)(a)). Policy decisions such as licences to export and planning permissions, which cause incidental damage to individuals are, therefore, not within the exception[18] and it is likely the same distinction would be drawn in English law, where the supervision of government administration now achieved by judicial review would not come within "the tort exception."[19] U.S. courts have, however, allowed a remedy in tort for the exercise of a governmental discretionary function when it has been in contravention of the

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16. Loss of wages consequential on a physical injury are within the exception — *see* European Convention on State Immunity 1972 and para 48 of the Explanatory Report.

17. *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980); *Amalgamated Metal Trading Ltd. and ors v. Department of Trade and ors: Australia and New Zealand Banking Group Ltd and ors v. Commonwealth of Australia*; Transcript Judgment of Evans J. (21 February 1989 38 at 41-42. *See* Fox *op. cit.* n. 15 p.23).

18. *Olsen by Sheldon v. Govt of Mexico*, 729 F.2d 641 (9th Cir. 1964) cert. denied 105 Sup. Ct. 295 (1984); *McArthur Area Citizens Association v. Republic of Peru*, 809 F.2d 918 (DC Cir. 1987).

19. Fox *op. cit* n. 15 p. 29.

defendant government's own constitution; a remedy in tort has thus been allowed for authorisation or involvement in political assassination.[20] A fourth limitation found in the U.S. law is that the injury or loss occur "from acts of an official or employee of the foreign State solely while acting within the scope of his employment." To date, the U.S. Federal Courts have interpreted this provision by reference to the common law vicarious liability of a master for his servants' torts which is a narrower rule of attribution than the rule to be found in State responsibility where a State may be held responsible for acts done ultra vires or outside the scope of employment.[21] Nonetheless, in *Liu v. Republic of China*,[22] the U.S. 9th Circuit Court of Appeals held the government of Taiwan to be implicated in the assassination of a U.S. citizen on the orders of its Director of Defence Intelligence Bureau, though the motive appears to have been more the wish of one official to silence a critic than to further interests of the Taiwanese government.

From the above brief summary, it will be seen that the tort exception provides a remedy to private litigants against foreign governments for a limited category of wrongful acts when committed outside their own jurisdiction. Because the liability arises by reason of conduct committed outside the State's exclusive jurisdiction, the plea of exhaustion of local remedies is not an automatic bar. This is an important advance for the private litigant because the attribution of the tort-feasor's act to the State and the governmental character of the tortious conduct approximates the area of liability covered by the tort exception to that of State responsibility, that is to "acts or omissions of [government] officials, acting within the limits of their authority, when such acts or omissions contravene the international obligations of the State." The political assassination cases in the United States, *Letelier v. Republic of Chile*,[23] *Liu v. Republic of China*, the

20. *Liu v. Republic of China* (1990) 29 ILM 192.
21. *Castro v. Saudi Arabia*, 510 F. Supp. 309 (W.D. Tex. 1980).
22. (1990) 29 ILM 192.
23. 485 F. Supp. 665 (D.D.C. 1980).

Rainbow Warrior[24] incident in New Zealand, various shooting incidents, such as the St. James Square London incident,[25] of local citizens by diplomatic guards at foreign embassies — these are the type of case where the tort exception may provide a remedy in civil law in U.S. or English courts parallel and independent of the more usual route of diplomatic espousal of the claim and State responsibility. The area of wrongdoing covered by the tort exception is narrow; it is essentially confined to deliberate or negligent injuring by government officials of individuals and their property when located in a third State. There is wide agreement as to the nature of the international obligations and the type of conduct which constitutes a breach of such obligations on these matters. In the words of the U.S. Supreme Court in *Sabattino*:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law the more appropriate it is for the judiciary to render decisions regarding it...since the courts can then focus on the application of an agreed principle to circumstances of facts rather than on the scientific task of establishing a principle not inconsistent with national interest or international justice.[26]

VII. Private Law Remedy in Courts of the Wrongdoer State

Our examination of the tort exception in the U.S. FSIA and U.K. SIA has established one model for a civil law remedy against governments for wrongful conduct contrary to international obligations. But it leaves unaffected the larger category of wrongdoing committed by the home State within its territory against nationals and non-nationals.

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24. Case concerning difference between New Zealand and France arising from the Rainbow Warrior 19 R.I.A.A. 199, 74 I.L.R. 241 for the arbitration relating to agents Mafart and Prieur, *see* (1991) 40 *International and Comparative Law Quarterly* 446.

25. I. Cameron, "First Report of the Foreign Affairs Committee of the House of Commons," 34 *International and Comparative Law Quarterly* 610 (1985). For other incidents *see* Fox, *op. cit* n. 15, p. 8.

26. 376 U.S. at 428.

Would the grant of a similar civil law remedy in the courts of the home State give greater accountability of the State in the discharge of its international obligations? Take the recent European Convention for the Prevention of Torture.[27] Instead of, in addition to, the requirements of the enactment of penal sanctions against the official who commits acts of torture, why should the Convention not also require a civil remedy to be available in the national court to the victim of such torture? Such a court remedy should go not merely against the official but also the government on whose behalf he tortured.

As already indicated such a proposal is clearly radical and may be thought by many to be politically and practically unworkable. To revert to the structural differences between international and municipal law referred to earlier, the court charged with the task may be an inappropriate agency for settlement of intergovernmental disputes or high security matters. The sophistication of private law procedures, the growing worldwide network to permit enforcement of foreign judgments, involvement of private litigants and lawyers may serve to depoliticise disputes but runs the risk of bringing the judiciary into open conflict with the executive. Apart from the prohibition not to cause deliberate physical injury to a person, many of the international standards set by treaties require for their implementation "policy choices or value determinations" which most countries' constitutions allocate to the executive branch of government. Unless such international standards can be brought within tort concepts which the courts are able to apply, there seems little in the way of an effective method of State accountability which the private law remedy can offer. Its use, also, depends on the individual litigant's decision. Whilst Western societies see the national courts as a champion of private rights not all countries acknowledge that role and in some the status of the courts would hardly justify any such expectation; with notable exceptions, such as India, aggrieved individuals in these countries would place little confidence in a private legal process for implementation of international obligations. Even should they

27. *Supra* n. 1.

articulate their claim in legal form, its ambit, prosecution and resolution remains under the control of the individual litigant. It may be compromised by payment of damages to the detriment of enforcement in the interest of the whole national or international community of the principle behind the obligation. Release of hostages in return for money paid by the victims' families provides an illustration. The third structural difference relates to the nature of the right conferred by treaty, Essentially it is one of public law — addressed to the State and all its agencies to ensure its continual observance; an award of damages for failure to comply is ancillary to rather than the main purpose of such an obligation.

VIII. Conclusion

It is not possible in the space of this short paper to develop the argument further. It is hoped that the brief account of the tort exception to State immunity will provide an opportunity to think through the consequences of giving wider remedies to individuals to enforce international law. For conduct where the morality which prohibits the act is widely accepted, not merely by governments but by all communities in different nations, the private law remedies may play a part. Official killings and torture would seem a good starting point and in most countries the relevant law will be duplicated in international convention and municipal law. But in the wider field of abuse or maladministration of public powers — police protection, immigration, extradition — the common basis of morality on which governments are expected to act is too small to permit its uncontroversial enforcement by individuals by means of the municipal courts of the world.